

September 11, 2008

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UNITED STATES DISTRICT COURT

DISTRICT OF NEW JERSEY

Civil Action No. 08-141

2008 OCT -1 10 4:35  
UNITED STATES  
DISTRICT COURT

In Regard to the Matter of:

OPINION/REPORT

Bayside State Prison

OF THE

Litigation

SPECIAL MASTER

MICHAEL HYER,

-vs-

WILLIAM H. FAUVER, et al,

Defendants.

\* \* \* \*

THURSDAY, SEPTEMBER 11, 2008

\* \* \* \*

BEFORE THE HONORABLE JOHN W. BISSELL, SPECIAL MASTER

September 11, 2008

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Transcript of proceedings in the above

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matter taken by Theresa O. Mastroianni, Certified

6

Court Reporter, license number 30X100085700, and

7

Notary Public of the State of New Jersey at the

8

United States District Court House, One Gerry Plaza,

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Camden, New Jersey, 08102, commencing at 3:25 PM.

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856-546-1100

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1 JUDGE BISSEAU: We're reopening the  
2 record in the case of Michael Hyer versus William  
3 Fauver, et al, docket number 08-141.

4 This opinion/report is being issued  
5 pursuant to the directives of the Order of Reference  
6 to a Special Master and the Special Master's  
7 Agreement and the guiding principles of law which  
8 underlies this decision to be applied to the facts  
9 upon which it is based as set forth in the jury  
10 instructions in the Walker and Mejias jury charges to  
11 the extent applicable to the allegations of Mr. Hyer.

12 As finalized after review under Local  
13 Civil Rule 52.1, this transcript will constitute the  
14 written report required under paragraph seven of the  
15 Order of Reference to a Special Master.

16 Mr. Hyer was assigned to A Unit and the  
17 events which allegedly occurred involved the removal  
18 of the inmates from A Unit for the search of that  
19 unit. This occurred on or about August 11th of 1997  
20 and I'm going to recount certain parts of his  
21 testimony concerning the events in question.

22 The first events occurred upon his  
23 extraction from his cell and the revelation of a  
24 tattoo which he had which indicated at least at the  
25 time apparently it was put in place a membership in

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1 the Five Percenters of Islam.

2 Page 90 beginning at line six.

3 "Question: Now, when you were outside  
4 the cell, was that tattoo visible to the guards?

5 "Answer: Yes, it was.

6 "Question: Were any comments made  
7 about the tattoo?

8 "Answer: He asked me if I was a Five  
9 Percenter. I said I no longer study the Five Percent  
10 lessons. He was, like, we don't like Five Percenters  
11 and after that he punched me in the ribs."

12 The question was where were your hands  
13 at the time he punched you in the ribs. There was an  
14 indication that they were interlocked behind his head  
15 with his elbows out.

16 Testimony continues in connection with  
17 these incidents at page 91, line 20.

18 "Question: Did there come a point when  
19 anyone was doing anything to your head?

20 "Answer: Yes. They had pushed my head  
21 into the wall.

22 "Question: Did you feel some pain from  
23 that?

24 "Answer: Slight pain, yes.

25 This occurred, by the way, outside the

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1 cell.

2 Let me back up there so its easy.

3 "Question: Before we get to that,

4 though, when you were outside the cell with your

5 hands behind your head, where was your head at that

6 point?

7 "Answer: My head was in the wall.

8 "Did there come a point where anyone

9 was doing anything to your head?

10 "Answer: Yes, they had pushed my head

11 into the wall.

12 "Did you feel some pain from that?

13 "Slight pain, yes.

14 "How about from the punch?

15 "From the punch, yeah, it hurt.

16 Punched me in the ribs."

17 Page 93 beginning at line 24.

18 "Did any SOG officers approach you at

19 that point with any kind of questions or inquiries?

20 This is while he was in the gym at this point.

21 "Yeah, a few minutes later one of the

22 SOG officers came over and started asking me my name.

23 By this time I didn't want to answer anything because

24 of what just happened to me about being a Five

25 Percenter and I was scared. So he asked me my name.

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1 I didn't say anything.

2 "Question: What happened next?

3 "Answer: He asked me a few more times

4 and I didn't say anything. Then he was like -- he

5 took the black club and started hitting me in the

6 head saying, inmate, I asked you your name. I didn't

7 say anything. So after that a couple other officers

8 came over and took me to the back, drug me to the

9 back and they told me to kneel facing the grill  
10 gate."

11 That subject was addressed again on  
12 cross-examination and a relevant excerpt beginning on  
13 line four of page 116 starting with the question: "I  
14 think you next testified that you were taken to the  
15 gym and then you were taken to your location in the  
16 middle of the gymnasium, correct?

17 "Yes.

18 "You were asked to sit down, correct?

19 "Yes.

20 "And at that time that's when the  
21 officer commenced asking you your name, correct?

22 "Yes.

23 "And you claim that you didn't answer  
24 because you were afraid to give him your name,  
25 correct?

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1 "Yes.

2 "Now, at some point you said that the  
3 officer hit you on the top of your head, correct,  
4 with a blackjack?

5 "Answer: Yes, with a billy club.

6 "Go ahead, I'm sorry.

7 "He was standing on top of me and he  
8 was tapping me in the head. I asked you your name.

9 "Question: And he tapped you on the  
10 top of your head, do you know how many times?

11 "Right there approximately four or  
12 five.

13 "Question: Four or five times?

14 "Right.

15 "And, again, I think as a result of  
16 that you testified at your deposition that when you  
17 got back to your cell you found a little lump on top,  
18 correct?

19 "Yes.

20 "But, again, there was no bleeding that  
21 came as a result of that?

22 "Answer: No, no bleeding.

23 "I think you described it as being  
24 tapped on the stop of your head, correct?

25 "Well, he was bouncing the stick off of



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1 my head."

2 And then finally as a part of the  
3 alleged incidents here on his direct examination  
4 beginning on line two of page 95, he's now in the  
5 cage area of the gym.

6 It's actually an answer here.

7 "Yeah, after a few minutes one of the  
8 officers came over and he asked me how I was going to  
9 repay the officer's wife and children for what  
10 happened to that officer.

11 "Do you know who he was referring to?

12 "Not at that time, not at that time, I  
13 didn't.

14 "Well, did you have any answer for him?

15 "No, I didn't say anything.

16 "What did he do?

17 "He looked at me, he said I want you to  
18 remember my face and he punched me in the face and he  
19 spat in my face.

20 "What did he punch you with?

21 "He punched me with his fist."

22 Now, in analyzing this, I have  
23 determined that in the instances where this, in fact,  
24 occurred, that excessive force was not employed.  
25 Now, I realize that the circumstances are very rare

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1 under which a punch can be excused, but in Mr. Hyer's  
2 case I find that in terms of his recounting of it at  
3 the cell that it was somewhat overstated.

4 I also find that the Five Percent  
5 Nation, we've had testimony of this on the record in  
6 the course of these cases, was perceived as some type  
7 of a gang or at least some sort of organization, if  
8 you will, within the prison to be discouraged and  
9 which might constitute a threat to security.  
10 Consequently, a corporal assertion of some dimension  
11 at least of correction officer's authority, in order  
12 to deliver the message that this type of subculture  
13 within prison walls was not to be taken lightly,  
14 while perhaps not readily condoned and maybe even  
15 tortious under other circumstances, did not rise to  
16 the level of excessive force with a sadistic purpose  
17 consistent with the definition of the conduct which  
18 would support a violation of the United States  
19 Constitution.

20 Similarly, with regard to the so-called  
21 incidents of pressing his head against the wall  
22 outside the cell, while there may have been some  
23 touching here, that is also under the circumstances  
24 in my view not excessive force and a legitimate  
25 exercise of authority for the purpose of putting

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1 somebody under control at the beginning of a prisoner  
2 movement. And once again, here is a person whose  
3 membership, or at least whose evidence of membership,  
4 in a subculture within the prison would have given  
5 rise to heightened measures of the assertion of  
6 control under the circumstances.

7 Finally, with regard to the incident in  
8 the gym, once again, the failure to give his name  
9 four and five times over as a product of fear,  
10 frankly, is not credible. Mr. Hyer's name is readily  
11 available to all. One might say why would the guards  
12 have even bothered to ask, but it may be that they  
13 did so for the purpose of eliciting a response or,  
14 once again, to demonstrate that they were the ones  
15 who were going to be in control of the dialogue and  
16 expected answers to their questions.

17 He refused some five times or other,  
18 and indicated that as he refused, he would be tapped  
19 on the head lightly with the baton, once again, not  
20 excessive force under the circumstances, just as a  
21 reminder that they had every right to expect that he  
22 would give his name and he should do so. But he  
23 didn't. They took him to the back area of the gym,  
24 that's fairly understandable, removing him from the  
25 line. But at this point, I don't know whether it's a

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1 realization of Mr. Hyer that maybe nothing really  
2 actionable as yet happened to him as far as how he  
3 wants to testify or assert his claim or something  
4 else, but I find that the testimony about having an  
5 officer get in his face, state remember my face and  
6 then punch him in the face and spit in his face, in a  
7 room full of people, not only other officers but  
8 civilians and the like, is just not credible.

9 I might add at this point, I am not  
10 relying upon the purported Internal Affairs report  
11 that somehow or other he recanted his statement about  
12 being punched when he was examined by Internal  
13 Affairs. That wasn't really established one way or  
14 the other. And that report as such was not admitted  
15 into evidence as an exhibit, so I wasn't in a  
16 position to examine it. I just want to make it  
17 perfectly clear that while I make no finding as to  
18 whether he did or did not recant his statement before  
19 the Internal Affairs investigators, I just do not  
20 find that this recitation of having been punched  
21 squarely in the face and been spit at in the gym with  
22 all the people around, including administrators,  
23 people from Internal Affairs and ombudsmen, was  
24 credible. And under the circumstances there, that  
25 incident, which clearly would, if proven, have been

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1 excessive force, I just don't find it's been proven  
2 and, in fact, it did not occur.

3           As I mentioned, otherwise the other  
4 incidents here were not excessive force and  
5 represented at least allowable exercises of force to  
6 gain and maintain control of a potentially dangerous  
7 inmate, and in the latter instance, response to  
8 insubordination about not giving his name to  
9 officers.

10           Finally, although not every item of  
11 evidence has been discussed in this opinion/report,  
12 all evidence presented to the Special Master was  
13 reviewed and considered. For the reasons set forth  
14 above, I recommend in this report that the district  
15 court enter an order and a judgment of no cause for  
16 action with regard to Michael Hyer.

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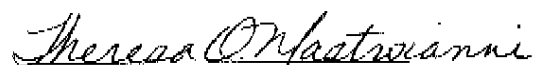
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## C E R T I F I C A T E

I, Theresa O. Mastroianni, a Notary Public and  
Certified Shorthand Reporter of the State of New  
Jersey, do hereby certify that the foregoing is a  
true and accurate transcript of the testimony as  
taken stenographically by and before me at the time,  
place, and on the date hereinbefore set forth.

I DO FURTHER CERTIFY that I am neither a  
relative nor employee nor attorney nor counsel of any  
of the parties to this action, and that I am neither  
a relative nor employee of such attorney or counsel,  
and that I am not financially interested in the  
action.



Theresa O. Mastroianni, C.S.R.

Notary Public, State of New Jersey

My Commission Expires May 5, 2010

Certificate No. XT0857

Date: September 11, 2008

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